

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In the Matter of

Establishment of Rules and Policies for the
Digital Audio Radio Satellite Service in the
2310-2360 MHz Frequency Band

IB Docket No. 95-41
GEN Docket No. 90-357
RM No. 8610

To: The Commission

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COMMENTS OF PRIMOSPHERE LIMITED PARTNERSHIP

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SUMMARY

Primosphere Limited Partnership ("Primosphere") hereby submits its comments in response to the Commission's Notice of Proposed Rule Making in IB Docket No. 95-41 (Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Band). As one of four remaining applicants for an SDARS license, Primosphere is poised to initiate a new and exciting radio service for the American public. Primosphere will provide multiple channels of diverse, high-quality audio service to rural Americans and others desiring a choice of programming not now available through traditional terrestrial broadcasting. Primosphere will provide this service on a non-subscription, advertiser-supported basis.

Primosphere is convinced that in order to bring this new service to the public as rapidly as possible, the Commission should process the four pending applications before it. The Commission established a cut-off date for SDARS in the 2310-2360 MHz band that ended three years ago. The present applicants have been formulating their plans since that time in the expectation of moving forward to provide this new SDARS option to the public as soon as possible. The applicants state and the Commission agrees that the four applications are not mutually exclusive. Under these circumstances, alternative licensing schemes based on competitive bidding scenarios are not available to the Commission.

Primosphere urges the Commission to license the entire 2310-2360 MHz band allocated for SDARS. Holding 10 MHz in reserve is not necessary to facilitate coordination with Canada.

Primosphere also urges the Commission to impose the minimum level of service rules on SDARS necessary to promote the public interest. To a large extent, the market will be the best determinant of how SDARS is provided. Each SDARS licensee should be free to choose whether to provide subscription or advertiser-supported services, or possibly a combination of both.

Finally, as Primosphere shows, SDARS, even if advertiser-supported, will have a minimal effect, if any, on local terrestrial radio stations. Indeed, based on past experience with competitive technologies, one can expect local radio service to improve and continue to thrive.

Primosphere urges the Commission to pursue the normal licensing procedures used for non-mutually exclusive applicants and license the entire band allocated for SDARS in order to permit this valuable new service to be initiated as rapidly as possible.

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)	IB Docket No. 95-41
Establishment of Rules and Policies for)	GEN Docket No. 90-357
the Digital Audio Radio Satellite Service)	RM No. 8610
in the 2310-2360 MHz Frequency Band)	

To: The Commission

COMMENTS OF PRIMOSPHERE LIMITED PARTNERSHIP

Primosphere Limited Partnership ("Primosphere"), by its attorneys, hereby respectfully submits these comments in response to the Commission's Notice of Proposed Rule Making, FCC 95-229 (released June 15, 1995) ("Notice"), in the above-captioned proceeding. Primosphere is an applicant for authority to construct, launch and operate a Satellite Digital Audio Radio Service (SDARS) system in the 2310-2360 MHz band.¹ In addition to these comments, Primosphere is a party to "Joint Comments of the DARS Applicants," also being submitted today in this proceeding.

In its Notice, the Commission proposes rules governing the licensing and operation of SDARS systems. As discussed below, strong public policy considerations compel the swift adoption of licensing and service rules for SDARS that impose the least restrictions on the service and allow this long-delayed service to bring its substantial benefits to the American public.

¹ See Primosphere Application, File Nos. 29/30-DSS-LA-93 and 16/17-DSS-P-93, filed on December 15, 1992.

I. INTRODUCTION

SDARS holds the promise of providing high-quality digital audio service to the American public with an unprecedented variety of audio programming. Primosphere and the other three applicants have demonstrated their commitment to the service by investing millions of dollars in the filing and prosecution of their applications and the development of their SDARS business plans. This investment includes over \$400,000 in filing fees paid to the Commission nearly three years ago.² Primosphere stands ready to begin constructing its system and providing the many unserved and underserved people in this country with unique, responsive and high quality new programming and services. To ensure prompt implementation of SDARS, Primosphere urges the Commission: (1) to process the four pending SDARS applications, which are not mutually exclusive; (2) not to reopen the December 15, 1992 SDARS filing deadline; and (3) to adopt a minimal regulatory structure similar to that adopted by the Commission for PCS, Big LEOs and DBS. The provision of SDARS in a timely manner will benefit the American public as well as stimulate the U.S. economy.

² See "Digital Audio Radio Service Satellite Systems Applications Launch Fee Required," Report No. DS-1264, released December 9, 1992. That notice established a January 5, 1993 deadline for launch fees of \$70,000 per satellite. The four pending applicants propose a total of six satellites. Prior to the submission of this \$420,000 in launch fees, the four applicants had submitted initial filing fees of \$2,030 per satellite.

II. THE PUBLIC INTEREST WILL BE SERVED BY PROMPT ACTION ON THE PENDING SDARS APPLICATIONS.

A. The Introduction of SDARS: Two Possible Scenarios.

There are two possible paths the Commission can take in resolving this rulemaking, each with its own set of consequences. Following the first path, the Commission acts promptly to license all qualified applicants and adopts service rules that allow SDARS operators the flexibility to develop systems and programming that are responsive to consumer demand and technological advances. Roughly four years from the date of licensing, the first SDARS systems are launched, bringing unprecedented audio service to rural Americans, people who travel in remote areas and individuals whose listening needs are currently neglected. Terrestrial broadcasters, though largely unaffected by this new service, accelerate their move to digital broadcasting, providing better audio quality, increased spectrum efficiency and a heightened commitment to local issues in response to SDARS.

The alternative path is significantly less favorable for the American public. The Commission, concerned about the effect of SDARS on local broadcasting, further delays introduction of this service or hobbles it with inflexible technical and service rules. Rural Americans and underserved audiences are denied the single most important advance in broadcast services since Direct Broadcast Satellite Television (DBS). But the local public interests these broadcasters claim to protect are illusory. Terrestrial broadcasters continue to delay implementation of digital broadcasting and continue to shift their focus away from local public service through programming agreements and station acquisitions that cause them to resemble the national SDARS service they fight so hard to forestall.

This rulemaking proceeding presents the Commission with an opportunity to take a significant step towards enhancing the access of rural and underserved Americans to new and

diverse broadcast resources. The terrestrial broadcasters that oppose SDARS offer the American public nothing in return for the protection they seek: no change in service, no improvement in audio quality, no wider access, no new programming. Primosphere submits that a decision to preserve the status quo at the expense of SDARS and the millions of listeners who want this service cannot be justified based on either public interest considerations or sound economic analysis.

In its Notice, the Commission asked for hard economic analysis of the impact of SDARS on terrestrial broadcasting. Primosphere and American Mobile Radio Corporation ("AMRC") submit as an attachment to their respective comments a study produced by the economic consulting firm MTA/EMCI (hereinafter the "MTA/EMCI Study") which provides the first real quantitative analysis of the projected growth and impact of SDARS on terrestrial broadcasting.³ This study provides a basis for the Commission to make a reasoned choice between the two paths described above and points quite clearly toward the path of adopting flexible licensing and service rules that will lead to the prompt processing of the four pending SDARS applications. While Primosphere recognizes that the burden is on the opponents of SDARS to supply this type of analysis, it nevertheless submits this study to aid the Commission in a prompt and equitable resolution of this proceeding.

B. The Introduction of SDARS Will Benefit the American Public.

The benefits of SDARS are clear. There are a number of unserved audiences whose needs are not being met by local terrestrial broadcasters because they do not exist in sufficient concentrations within local markets to support local radio stations. Such audiences include children, senior citizens, ethnic groups, and fans of America's musical heritage in

³ The MTA/EMCI Study is attached hereto as Appendix A.

such areas as roots rock, blues and jazz. The national reach of SDARS will enable SDARS applicants to provide these audiences with programming formats that currently are unavailable. More importantly, Primosphere will provide such programming to these audiences for free.

In addition to an increase in the variety of programming, SDARS will eliminate the current inequities in audio program availability between urban and rural areas by allowing all listeners to receive the same high-quality digital programming regardless of their location. Primosphere submitted with its original application a study showing that almost 22 million people in the U.S. (in roughly three million square kilometers) had access to five or fewer FM signals.⁴ That study also shows that 1.6 million people in the U.S. receive only one FM station and one million people receive no FM stations at all.⁵ Among rural radio stations, roughly 60 percent play one of only two formats — country or adult contemporary.⁶ SDARS is an inherently egalitarian service that will allow the Commission to fulfill both the diversity and signal quality needs of these underserved listeners. Furthermore, the digital format will allow programmers to introduce ancillary services such

⁴ Jules Cohen & Associates, P.C., Engineering Statement in Support of an Application for Satellite Digital Audio Radio Service, Primosphere Limited Partnership at 1. A copy of that study is attached hereto as Exhibit 7 to Appendix B.

⁵ Id. at 2. See also Lilley & DeFranco, Satellite Radio (August 1994) at 23 (submitted with Comments of Satellite CD Radio, Inc. pursuant to the Notice of Proposed Rulemaking in Gen. Docket No. 90-357) ("CD Radio Study").

⁶ Statement of Primosphere Limited Partnership, submitted on January 3, 1995 in Docket No. 90-357 (hereinafter "Primosphere January 1995 Statement"), a copy of which is attached hereto as Appendix B. The data cited is referred to on page 9 of the Statement of Clifford N. Burnstein, attached thereto (hereinafter "Statement of Clifford N. Burnstein").

as the transmission of news, stock quotes or programming information in text format. These services are certain to grow in quality and scope as the service matures.

Primosphere proposes, within a 12.5 MHz allotment, to provide 19 channels of near-CD quality music and seven to nine voice-quality channels. Primosphere will donate one of its music-quality channels and one of its voice-quality channels to public broadcasting (including free up-link facilities). In addition, Primosphere will dedicate one of its voice-quality channels for a reading service for the visually-impaired and one of its music-quality channels for children's programming.

C. The Introduction of SDARS Will Provide Economic Benefits to the United States.

Because SDARS will cater mainly to unserved or underserved populations, it will increase the number of programming and advertising outlets in the United States and the amount of money spent on radio advertising. A new national radio advertising market will develop, allowing advertisers access to niche audiences that could not otherwise be reached effectively. This in turn will lead to an increase in the diversity and quality of programming brought about by the influx of advertising revenue that access to the national advertising market will bring.

The investment in SDARS infrastructure — including the construction of satellites, gateway stations and programming facilities — will result in the investment of hundreds of millions of dollars in the American economy.⁷ The service will also create demand for a new generation of radio receivers, the development, manufacture and sale of which will also provide significant benefits to the economy. If the United States takes the lead in

⁷ Primosphere alone will invest \$363 million in its satellites.

implementing this service, it will stand a strong chance of regaining ground lost over the years in the radio manufacturing industry. Taken as a whole, SDARS will create the potential for the investment of hundreds of millions of dollars in the U.S. economy and will create a significant number of high-skill jobs.

D. The Introduction of SDARS Will Stimulate Terrestrial Radio to Provide New and Better Services.

Terrestrial radio has survived the numerous challenges it has faced over the years from new services by adapting and improving the service it provides to listeners. The 1994 CD Radio Study detailed the tremendous growth of radio in the face of new competitive technologies such as television, cable TV and car CD players.⁸ Contrary to the assertions of many of the opponents of SDARS, it is more likely than not that terrestrial radio will again adapt and improve in response to the introduction of SDARS, as it did in response to these other technologies.⁹

With the introduction of the new high-quality digital signals that SDARS will provide, terrestrial radio will have an increased incentive to accelerate the implementation of in-band, on-channel digital audio radio service. In order to distinguish itself from SDARS, which because of its very nature cannot provide local programming, terrestrial radio will have a

⁸ CD Radio Study at 19.

⁹ See Separate Statement of Commissioner James H. Quello, Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, 10 FCC Rcd 2310, 2319-2320 (1995) ("Allocation Order") ("Over and over, radio broadcasters have faced new challenges that have threatened their viability Why has radio survived? Because it has distinguished itself, over and over, from the new competitors it has faced over the years."). See also Chairman Reed E. Hundt, Speech to the NAB Radio Show (September 8, 1995) ("We should let DARS compete with terrestrial. Every instinct tells me that the results of that competition will be better radio service for the American public. And there is no reason to assume that terrestrial will do poorly in this competition.").

strong incentive to augment and improve its local programming within this new digital format.

Finally, SDARS will not just carve out a slice of the existing listener "pie," gaining listeners solely at the expense of terrestrial radio. Rather, SDARS will actually increase the size of the pie and bring new listeners into the market for radio services. Just as MTV, ESPN and other niche cable networks drew in new national advertising dollars from companies that had not previously advertised on television, SDARS will cause a similar increase in advertising revenue by opening new niche advertising markets.¹⁰ Cable did not just take national advertising revenue away from broadcast television; it created new advertising outlets and drew in new advertising dollars.

III. THE COMMISSION SHOULD PROCESS THE FOUR NON-MUTUALLY EXCLUSIVE PENDING APPLICATIONS.

A. The Commission Should Not Reopen the Proceeding.

Having spent nearly three years waiting and millions of dollars in preparation for the licensing and construction of their systems, Primosphere and the other SDARS applicants are eager to see the service licensed quickly and equitably. The four applicants have demonstrated through their investment, patience and resolute pursuit of their applications that they are committed to building and implementing their systems. Given this history, the Commission should not now rescind its December 15, 1992 filing window for SDARS and invite new applications. As will be demonstrated below, Commission precedent requires adherence to its cut-off procedures and the prompt processing of the four pending

¹⁰ This phenomenon is recognized in the MTA/EMI Study.

applications. To that end, the Commission should adhere to its long-standing cut-off policies and process the current pool of applications as soon as possible.

The use of cut-off procedures serves important public interest objectives. The cut-off procedure initially arose in the context of broadcast station licensing as an efficient measure to deal with a backlog of applications that presented increasing instances of inter-locked mutual exclusivity as the backlog grew.¹¹ The longer an application remained on the backlog, the more likely it was that a subsequently filed application would be mutually exclusive. The benefits of the cut-off process were: (1) to inject some finality into the application process by limiting the universe of mutually exclusive applications; (2) to give applicants "protected status,"¹² thereby enabling each applicant to prepare to do battle with an identified and limited set of opponents; and (3) to expedite what could be lengthy licensing proceedings.¹³

The Commission's concern for expediting licensing proceedings has been particularly important in the satellite services. Because of the long lead time involved in satellite construction and launch, and the delay that comparative hearings would entail, the Commission has established cut-off procedures in advance of actual spectrum allocation and embraced lotteries as a way to further expedite the licensing process.¹⁴

¹¹ Revision of AM Processing Procedures Report & Order, 18 P&F RR 1565 (1959).

¹² See City of Angels Broadcasting, Inc. v. F.C.C., 745 F.2d 656, 663 (1984); Ranger v. F.C.C., 294 F.2d 240, 243 (D.C. Cir. 1961).

¹³ See Radio Athens, Inc. (WATH) v. F.C.C., 401 F.2d 398 (D.C. Cir. 1968).

¹⁴ See Mobile Satellite Service, 6 FCC Rcd 4900 (1991).

As the Commission recognized in the Mobile Satellite case, reopening a filing window after an initial cut-off date would delay the implementation of service to the public. In the instant proceeding, the Commission not only contemplates reopening the filing window, but suggests that to do so would enable it to conduct auctions and tentatively concludes that this would speed service to the public! With such a proposal, the Commission perverts the entire concept of cut-off procedures.

The Commission has always been loathe to waive its cut-off procedures¹⁵ or reopen filing windows.¹⁶ In the few instances where it occurred, the waiver has generally been on remand from a court (e.g., Satellite Broadcasting Company, Inc. v FCC, 824 F.2d 1 (D.C. Cir. 1987)) or on the Commission's own recognition that it had improperly excluded an otherwise eligible applicant (e.g., Fine Music, Inc., 6 FCC 2d 186 (1966)). Here, the Commission contemplates reopening the filing window for the sole purpose of creating mutual exclusivity where none exists so that the Commission can create an auction opportunity.

Primosphere and the other three remaining SDARS applicants have acted in reliance on the Commission's 1992 cut-off notice. Primosphere alone has spent more than \$650,000 in the filing and prosecution of its application, not including the time spent by its principals.

¹⁵ See Coalition for the Preservation of Hispanic Broadcasting v. F.C.C., 893 F.2d 1349 (D.C. Cir. 1990) (refusing to grant request for waiver of cutoff rule based solely on general public interest in competition); The Telephone Co., Inc., 49 FCC 2d, 858 (1974) (denying waiver request for application in the Domestic Public Radio Service filed two years after cutoff date based solely on the fact that no action had been taken on the two previously filed applications and that one of these applicants might be withdrawing); Multipoint Distribution Service, 37 FCC 2d 444 (1972) (refusing to waive cutoff rules in order to permit potential applicants to await outcome of rulemaking proceeding before filing their applications).

¹⁶ City of Angels Broadcasting, Inc., 745 F.2d at 662-664.

In the nearly three years since the cut-off date, no other party has requested that the Commission waive its rules and re-open the filing window for SDARS. If someone does so now, it would be only due to the efforts of the four pending applicants over the past three years and recent suggestions by Commissioners that the Commission should consider doing so.

B. Auctions Would Not be in the Public Interest.

In its Notice, the Commission has proposed three different licensing schemes:

- (1) simply license the available spectrum in equal shares to the present four applicants;
- (2) license less spectrum to the present four applicants and auction the rest; or (3) accept new applications and auction all the spectrum. The law compels the Commission to choose the first alternative.

The Commission has opened and closed a filing window and accepted six applications. The remaining four of those six applicants, by their own statements, as well as the Commission's own tentative judgement, are not mutually exclusive.¹⁷ This is not a case where those who filed applications before the Commission was given auction authority are arguing the equity of licensing by more traditional means such as lottery to resolve mutually-exclusive applications.¹⁸ Under normal circumstances, the Commission would readily begin the licensing process. It is only the glitter of competitive bidding that has made the Commission hesitate.

¹⁷ See Notice, ¶ 95.

¹⁸ Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service (MM Docket No. 94-131) and Implementation of Section 309(j) the Communications Act — Competitive Bidding (PP Docket No. 93-253) Report & Order (released June 3, 1995).

In the present situation the Commission can fulfill its statutory obligation to license use of the spectrum and rapidly initiate a new service to the public with the least effort. The Commission has before it four applicants who by their own statements are not mutually exclusive. The four companies have refined their business plans in contemplation of sharing the spectrum at hand.¹⁹ Under these circumstances there is no justification whatsoever for the Commission to contemplate, much less undertake, the reopening of the filing window. It would clearly violate the Communications Act were the Commission to proactively seek to structure a more populous, and therefore mutually exclusive environment for the sole purpose of stimulating competitive bidding. Auctions are a way to resolve mutual exclusivity. The statutory availability of auctions to resolve mutual exclusivity does not give the Commission authority to create mutual exclusivity solely for the purpose of conducting an auction.²⁰

The Commission's second alternative, licensing less than the available spectrum to the present four applicants and auctioning the rest, is not an option supported by the record. In theory, the only path the Commission might take in pursuit of option two is to find, as a threshold matter, that the available spectrum will support more than four viable SDARS services, and that therefore competition would be enhanced. But there is absolutely no record evidence that would support such a finding. Indeed, given present technology, it is Primosphere's judgment that a smaller block of spectrum than that proposed will not enable a licensee to provide a diverse service to the public. The cost to build and launch the system

¹⁹ Primosphere is committed to filing an amendment to its application to request only a 12.5 MHz segment of the SDARS band, as soon as the Commission adopts SDARS service rules which allow further processing and grant of the pending four applications without reopening the December 1992 cut-off deadlines.

²⁰ The auction statute prohibits the use of auctions solely for the purposes of generating revenues. 47 U.S.C. § 309(j)(7)(A).

would be the same, but the service diminished. Technology is improving. It may be necessary to provide an even higher quality of service in the same spectrum in order to stay current, and competitive, with the state-of-the-art "CD quality" audio.²¹ An equal division of the available spectrum will permit Primosphere and the other applicants to take advantage of new developments in audio quality, yet still provide a diversity of formats. Smaller blocks of spectrum will threaten not only the viability of the service, but also the ability to improve its quality. It would be unseemly, at best, were the Commission to reach the conclusion that the available spectrum will support more than four licensees merely for the opportunity to hold an auction. Surely, the Commission would not contemplate choosing a threshold standard for licensing eligibility, even in part, for the purpose of holding an auction.

In fact, the cut-off process, itself, has resulted in only four applicants willing to provide DARS service. Originally, the number was six. Two have withdrawn their applications. No other entities have come forth seeking to reopen the filing window. In a sense then, the cut-off process has created a market that has determined a number of applicants who want to provide SDARS service. The Commission has no basis to conclude otherwise.

The Commission's third alternative licensing scheme, simply to accept new applications and auction all licenses, is even more flawed. To pursue this path, the Commission would have to find first that there is not enough spectrum to support four viable

²¹ For example: "Terming the current 16-bit CD system 'inadequate,' a group of British audio engineers dubbed the Acoustic Renaissance for Audio (ARA) is calling for the development of a multichannel 24-bit high-quality audio disc (HQAD) that does not use data-reduction techniques." Stereo Review, October 1995, at 8.

SDARS operations. Again, there is no record evidence for this conclusion and the Commission's best evidence, the filings of the applicants, supports the opposite view. Moreover, even if the Commission could reasonably find that there is too little spectrum to be shared by the present applicants, it would have no basis for seeking additional applicants. If a cut-off procedure has any meaning at all, then the Commission would have to permit competitive bidding only from the present applicants, because their applications would then be mutually exclusive. Congress has permitted the Commission to resolve instances of mutual exclusivity by competitive bidding, but it has not directed the Commission to increase the pool of mutually exclusive applicants. There would be no reason to reopen the filing window in order to attract others, absent a desire to encourage a more lucrative bidding process. Reopening the filing window for this purpose would destroy the integrity of the cut-off process.

While the recovery of money for the public was a congressional goal in amending Section 309 of the Communications Act to permit competitive bidding for licenses,²² it is not a goal in and of itself. Auction authority was granted because one of the flaws of the lottery system was that while private parties bought and bartered among themselves, no money was recovered for the public. Congress did not conclude, however, that the award of all licenses should be taken as an opportunity to raise funds. Nor did it attach a price tag to the use of spectrum. Congress merely stated that the Commission can resolve instances of mutually exclusive applications by competitive bidding.

²² Section 309(j)(3)(C) of the Communications Act of 1934, as amended, 47 U.S.C. 309(j)(3)(C).

Moreover, the law compels the Commission to avoid competitive bidding when it can otherwise settle issues of mutual exclusivity. Section 309(j)(6)(E) states:

[Nothing in this subsection, or in the use of competitive bidding] shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.

47 U.S.C. ¶ 309(j)(6)(E). Presumably, the Commission is to keep in mind the goal of recovering money when it is choosing between lotteries and auctions; but when the Commission is determining threshold standards for awarding licenses, its obligation is more prosaic — to determine the nature of a communications service that will best serve the public.

Another perceived goal of the auction process is speed. As the Commission noted in its recent revision of the Private Land Mobile Service Rules:

As a result of our experience with auctions, we have concluded that using competitive bidding to award licenses, as compared with other licensing mechanisms, speeds the development and deployment of new services and encourages efficient use of the spectrum. In this regard, we note that auctions generally award licenses quickly, to those parties who value them the most highly and who are therefore most likely to introduce service rapidly to the public.²³

In the present situation, the Commission can award licenses even more rapidly to the only parties who have demonstrated that they value them simply by skipping the auctions. It

²³ Report and Order and Further Notice of Proposed Rulemaking (PR Docket 92-235) (released June 23, 1995) ¶ 4.

can be presumed that the Commission's filing window served to attract all those interested in pursuing DARS.²⁴ Each applicant has demonstrated its financial commitment to the new service. The applications are not mutually exclusive. The spectrum has been allocated. A license award to each of the four pending applicants is surely the way to assure fastest service to the public.

Finally, if the Commission were to reopen the proceeding and accept additional applications, this would be a substantial reversal of the policy it has followed in licensing SDARS up to this point. The Commission established and adhered to a cut-off date for applications and has not acted on those applications for nearly three years. During that time, the applicants operated under the reasonable expectation that their applications would be processed and that no other applications would be accepted by the Commission. As noted above, this expectation was consistent with the long-standing policy of the Commission regarding its cut-off rules. There is no rational basis for the Commission now to reverse this course of action arbitrarily and reopen the proceeding for new applicants. This type of drastic, unexpected deviation from firmly-rooted Commission rules cannot be accomplished without "an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law."²⁵ Given the record developed in this proceeding, it would be nearly impossible for the Commission to satisfy this standard.

²⁴ The 1992 SDARS filing deadline was certainly well-publicized in the trade press. See e.g., "FCC Puts Satellite DAB Plan Up For Comments," *Broadcasting Magazine*, October 19, 1992, p. 28.

²⁵ Report & Order, Subscription Video, 2 FCC Rcd 1001, 1003 (1987), aff'd *National Ass'n for Better Broadcasting v. F.C.C.*, 849 F.2d 665 (D.C. Cir. 1988) (citing *Chisolm v F.C.C.*, 538 F.2d 349 (D.C. Cir. 1976).

IV. THE COMMISSION SHOULD LICENSE THE ENTIRE 2310-2360 MHz ALLOCATION.

The Commission should license use of the entire 2310-2360 MHz SDARS allocation to the current applicants. The Commission recently adopted this allocation for domestic U.S. service, consistent with the allocation in the International Radio Regulations adopted at the 1992 World Administrative Radio Conference.²⁶ It would be unwise and unnecessary to hold 10 MHz in reserve to address coordination with Canada. Moreover, licensing of four systems with 12.5 MHz each will ensure sufficient channel capacity to support these systems as well as serve the American public.

A. Holding 10 MHz in Reserve is Unprecedented and is not Necessary to Facilitate Coordination with Canada.

The Commission's proposal to allocate only spectrum above 2320 MHz for initial U.S. SDARS systems is not necessary. In its Notice, the Commission states its belief that licensing only the spectrum above 2320 MHz for initial U.S. SDARS systems could "alleviate the potentially difficult and lengthy coordination with other administrations, especially Canada."²⁷ This proposal is based on the Commission's misinterpretation of a sharing study submitted by Satellite CD Radio, Inc.

Primosphere agrees with Satellite CD Radio that their study on coordination with Canada supports the licensing of the entire 2310-2360 MHz band for use by the pending applicants.²⁸ As Satellite CD Radio points out, the total number of receivers in the band is

²⁶ Allocation Order, *supra* note 9.

²⁷ Notice ¶ 66.

²⁸ See Statement of Robert Briskman at 1, appended to Satellite CD Radio's Comments filed today in this proceeding, at page 1.

fewer than 200, which is "trivial when compared with normal U.S. fixed service usage with which satellite systems routinely share frequency spectrum."²⁹ Satellite CD Radio's analysis correctly points out that the Canadian receivers would experience an insignificant increase in their noise floor from the U.S. SDARS systems.

The U.S. should coordinate with Canada in the months following licensing of the U.S. SDARS systems. Such coordination should include all the U.S. SDARS licensees to ensure that any required system modification(s) does not unfairly impact one system more than another.

The initial U.S. SDARS systems should be afforded use of the full amount of spectrum allocated to this service. Conceding 10 MHz of a frequency band prior to any coordination between the U.S. and Canada is premature and, moreover, is highly unlikely to be required to resolve coordination issues. Primosphere, as well as other SDARS applicants, will agree to an appropriate power flux density limit or other technical or operational approaches which will protect Canadian systems. In fact, the Commission notes that "the majority of [the aeronautical telemetry] base stations are located at high latitudes . . . where reduced power flux density" would be received at the Earth's surface from the U.S. SDARS satellites,³⁰ thus indicating that the Canadian systems are unlikely to be adversely affected.

It is in the interest of the U.S. consumer to make available the entire allocated band to license the four pending applicants for such use, and to commence coordination with Canada and other administrations with four systems licensed to use the entire band. If coordination necessitates modification of the operating parameters, or spectrum use, of the

²⁹ Id.

³⁰ Notice ¶ 63.

U.S. licensees, these modifications can be addressed at that time. To proceed in any other manner would reduce the flexibility and negotiating position of the U.S. and disadvantage the U.S. licensees and ultimately, the U.S. consumer by reducing, ab initio, the number of channels available for SDARS service.

B. Each Qualified Applicant Should Be Licensed to Operate in a 12.5 MHz Segment.

The pending four applicants should be licensed to construct and operate their systems in accordance with the amendments which will be submitted following adoption of the Commission's licensing and service rules. Primosphere is ready, willing and able to proceed with construction of its system using 12.5 MHz for the service link. The applicants have already agreed on a sharing arrangement which will allow them to share the entire 50 MHz of spectrum, thus avoiding mutual exclusivity.³¹

The Commission has a long-standing practice of allowing satellite licensees to determine how inter-system coordination will be accomplished, "since they are in the best position to weigh the technical and economic trade-offs inherent in any coordination agreement."³² A similar type of informal inter-system coordination arrangement was recently endorsed by the Commission in licensing the Big LEO MSS systems.³³ The Commission should defer to the agreement of the SDARS applicants with regard to spectrum sharing.

³¹ See Joint Comments of the DARS Applicants, filed today in this proceeding.

³² Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands Report & Order, 9 FCC Rcd 5936, 5962 (1994) ("Big LEO Report & Order") ¶ 61.

³³ Id.

C. The Current Pool of Applicants is Sufficient for Competition in the Provision of SDARS.

The current number of applicants — four — is sufficient for competition in the provision of SDARS. The marketplace already has determined that four systems is the right number at present, by reducing the original six applicants to a group of four. Moreover, since the original cut-off date in this proceeding, no entity has requested that the Commission reopen the filing window for SDARS. The marketplace, not the Commission, is the best determinant of the ultimate number of SDARS providers. Thus, if one or more applicants drops out, the spectrum allocated to such applicants should be made available to other applicants consistent with the policy adopted by the Commission for Direct Broadcast Satellite Service.³⁴

The prompt processing of the four pending SDARS applications will afford competition similar to that which the Commission has recently found publicly beneficial in its report on Commercial Mobile Radio Service (CMRS).³⁵ This report, filed pursuant to Congressional requirements in the Omnibus Budget Reconciliation Act of 1993,³⁶ discusses

³⁴ See Applications of Continental Satellite Corp., et al., 4 FCC Rcd 6292, 6299 (1986) ¶ 54. In Advanced Communications Corporation, DA 95-944, released April 27, 1995, the Chief, International Bureau, declared null and void the construction permit of Advanced Communications Corporation, and, at ¶ 22, stated that the Bureau would "soon issue a notice regarding the reallocation of cancelled channels and available orbital positions." However, this Bureau decision is subject to both petitions for reconsideration and applications for review, and does not constitute a decision of the commission overturning the policy enunciated in Continental Satellite regarding the reallocation of channels in the event a licensee or permittee does not go forward.

³⁵ See Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services ("CMRS Competition Report"), FCC 95-317 (released August 18, 1995).

³⁶ The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. §§ 153(n),